87-385

Supreme Court, U.S.
FILED
SEP 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1987

No._____

JANICE PAUL, a/k/a JANICE PEREZ,
Petitoner,

vs.

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE
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JANICE PAUL, a/k/a JANICE PEREZ, Petitioner

vs.

WATCHTOWER BIBLE AND TRACT SOCIETY
OF NEW YORK, INC., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, Janice Paul, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 10, 1987.

QUESTIONS PRESENTED FOR REVIEW

(1) There is evidence that the motives of the corporate respondents in promulgating the painful and coercive doctrine of "shunning" are to isolate dissenters and punish recusants. Does the scope of religious freedom extend so far as to privilege such intentional harm; especially when committed for such motives?

(2) The question is sharpened when the persons being harmed are merely seeking their own freedom of religion, conscience and privacy.

(3) Where do we draw the line between the religious freedoms of the corporate respondents and the religious freedoms of the individual petitioner? That which is given to the corporate religion necessarily is taken from the individual.

(4) When and how deeply may we examine the motives of the makers of religious doctrine?

(5) The coerced shunning discourages present members from disassociating themselves and pressures former members to rejoin the religion. Is the protection of that policy by the state actually assisting in the "establishment" of a religion? Does the denial of civil relief force people unwillingly to practice this religion?

LIST OF ALL PARTIES

In addition to the parties named in the caption, the following are also party defendants:

Watchtower Bible and Tract Society of Pennsylvania, Troy A. Mertell and the marital community composed of Troy A. Mertell and Jane Doe Mertell, husband and wife; and Orville Crosswhite and the marital community composed of Oroville Crosswhite and Jane Doe Crosswhite, husband and wife.

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OPINIONS

The written Opinions of the Court of Appeals and the District Court are in the Appendix.

JURISDICTION

The judgment sought to be reviewed is dated June 10, 1987. No petition for rehearing was filed. Jurisdiction is conferred on this court to review the judgment in question by 28 USC 1254 (1).

CONSTITUTIONAL PROVISIONS

The First Amendment to the U.S. Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

STATEMENT OF THE CASE

The District Court granted summary judgment in favor of the respondents (the defendants below) and that judgment was affirmed by the 9th Circuit Court of Appeals.

The petitioner was raised from childhood as a Jehovah's Witness by her parents. The corporate respondents discourage association with persons outside their religious community. Therefore, almost all of the close friends of her youth and schooling were Jehovah's Witnesses. In 1975, at age 26, the petitioner was no longer interested in practicing this religion. She specifically inquired of her advisers in the religion whether she could simply resign and remain friends. She was told that she could. At that time that was

the official church policy. She otherwise would not have resigned but would have remained a nominal member and thus retained the association of family and friends. In fact, from 1975 to 1981 these friendships remained in tact.

In September 1981, the corporate respondents promulgated new rules that require the membership to shun anyone who resigns or had resigned from the religion. Shunning necessarily carried with it the implication that such persons were grossly immoral. Words such as "thieves, drunkards, prostitutes, adulterers and flesh defilers" are used in association with shunning.

It is a critical fact to this petition that the shunning required by the remaining faithful is not voluntary. If they are seen communicating with the "apostate" and are reported to the elders, they in turn will suffer the same fate.

Thus, in 1981, after having lived comfortably with former friends and associates in the Jehovah's Witnesses, the petitioner found herself completely cut off, shunned and rebuffed from almost all of the friends and acquaintances of her youth. She has suffered severely.

A second critical fact for this petition is the motive of the corporate resondents in promulgating the new doctrine in 1981. The affidavit of M. James Penton (CR 34), a Professor of History at the University Lethbridge, Alberta, Canada, is essential to our petition. It is included in the appendix. The content of this affidavit was stressed in brief and argument to the 9th Circuit but was not mentioned in the Opinion. Prof. Penton states that the 1981 change in doctrine was for the following purposes:

> "1. To isolate all dissenters and critics of Watchtower teachings and policies from Jehovah's Witnesses who have been instructed to avoid 'apostate wolves' on pain of disfellowshipment and 2., to punish anyone who has been a Jehovah's Witness for denying that the witness organization is God's sole channel of salvation for mankind today."

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Prof. Penton also describes the effect of shunning:

> "...This policy has had a serious, often terrible effect on the lives of many persons, frequently separating parents from children, brothers and sisters and long-standing friends from one another. Since Jehovah's Witnesses re a tight, sectarian community, this generally means that individuals who resign from them are cut off from their traditional roots and all childhood associations. Furthermore, as so-called "apostates", they are described among Jehovah's Witnesses as immoral, frequently being classified with 'thieves, drunkards, prostitutes, adulterers and flesh defilers.'...

JURISDICTION IN FIRST INSTANCE

The basis for Federal jurisdiction in the Court of first instance is 28 USC 1332 and 1447.

ARGUMENT

This case would require the court to clarify an area of increasing concern, i.e., harsh treatment by closed religious communities of their adherents. It involves not only this petitioner, but also other former members of the Jehovah's Witnesses and any present members who should desire to disassociate themselves.

The practical effect of the decisions below is to deprive a member of a religion of the right to disassociate himself or herself from that religion except at the cost of great pain, intentionally inflicted.

The case would profit from further legal analysis. The Court of Appeals differed from the District Court in reasoning although not in result. The District Court spoke of "judicial abstention". This was rejected by the Court of Appeals in favor of "qualified privilege".

We know of no other decision in the Federal Courts that has dealt with this particular issue. This is not a case of

state limitation of religious activity, such as the polygamy or handbill cases; or of state interference in arguments over church property or the identity of the true archbishop. This is a case of the religion initiating the harm and then claiming that a civil suit for relief is "government interference".

This is an attempt by a lone young woman to get free of the awesome power of an international religious sect. She has inherent natural rights as well as constitutional rights. We have always felt that the wrong party is claiming freedom of religion. The respondents deny her and probably thousands like her, freedom of conscience by denying them the right to leave without forfeiting long-time friendships, family and business relationships.

Certainly a religion does not have unlimited power over its membership. At some point it runs into the constitutional rights of the individual member. Typically, limits on religious activity start to operate when the activity collides with the rights of others. How shall we draw the line between these mutually exclusive rights?

The Court of Appeals opinion does not mention the two facts stressed there and in this petition, namely, the motives of the corporate respondents and the coerced shunning imposed on the remaining faithful. The Court of Appeals concluded that the religion enjoyed a qualified privilege in the absence of proof of actual malice. On page 17, in Footnote 7, the court states:

> "While the privilege is a qualified one, the only evidence Paul has presented is that Church members have shunned her at the direction of the Church; she has neither alleged nor shown that members of the Church hierarchy were motivated by reasons unrelated to their interpretation of the dictates of the religion..."

The petitioner submits that she has shown that the actions of the Church hierarchy were motivated by reasons unrelated to the dictates of the religion; or, at least, strong enough inferences can be drawn to require

the denial of the motion for summary judgment.

The malice of the corporate defendants is shown by two things. First, by the coercion of the remaining faithful to shun. If the enjoining of the remaining faithful to shun were simply based on faith and doctrine and spiritual advice, then it might merely be a case of "people won't talk to her". But when the faithful must also be terrorized, we have a strong inference that more is involved than doctrine.

The second item showing malice is Prof. Penton's testimony that the change of the rules in September 1981 was based on a desire to isolate critics and dissenters and to punish persons who reject the religion. Are these proper motives for putting such terrifying machinery in operation? Once a religion goes beyond teaching and persuasion, does it not go beyond its constitutional protection?

On a summary judgment motion the court must assume that Prof. Penton's opinion is true. Thus, are the courts prepared to approve harmful actions where the motives are more organizational than spiritual?

This kind of religion takes hostages similar to the totalitarian governments that make the citizen leave his family behind when he travels abroad. The new policy of September 1981 works exactly the same way. For people like the petitioner, whose entire youth was spent almost exclusively with Jehovah's Witnesses, they hold as hostage, literally, all of her family and friends who remain in their religion.

The current state of the law has placed limitations on religious activity only to prevent fraud and physical harm. For some reason it has been presumed that grievous emotional harm is different from a physical beating. The courts would not permit the corporate respondents to physically beat up recusants, but to emotionally beat them up is somehow allowable. But a tort is a tort. The petitioner has pleaded recognized torts and submitted evidence of them. In reality the physical beating would be less painful than the emotional beating. Although tort judgments certainly would hamper the operation of a religion, that is what tort judgments are for. Tort judgments represent the state interest in providing a substitute for private redress.

Another basis for power over members is the presumption that the member voluntarily joined. But in these closed religions, members, like this petitioner, were brought in as children and never subscribed to this treatment.

Should a religion be allowed to reach out and harm non-members? The petitioner had not been a member for six years when the respondents began this treatment. Is this any different than coercing persons who had never been members into joining?

We recognize that unlimited inquiry into the motives of religious doctrine could have a devastating effect on religious freedom. But are the worst motives to be allowed to go unexamined under the shelter of "divine revelation"? A line must be drawn, rules must be provided and this case provides a good opportunity to do so.

Respectfully submitted,

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APPENDIX

Court of Appeals Opinion of June 10, 1987

District Court Order of June 19, 1985

District Court Opinion and Order of June 19, 1985

Affidavit of M. James Penton

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANICE PAUL, a/k/a/ JANICE PEREZ,
Plaintiff-Appellant,

v.

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.,
Defendants-Appellee.

No. 85-4012

D.C. No.
CV 84-826-RJM

OPINION

Argued and Submitted
March 7, 1986—Seattle, Washington

Filed June 10, 1987

Before: Eugene A. Wright, Thomas Tang and Stephen Reinhardt, Circuit Judges.

Opinion by Judge Reinhardt

Appeal from Eastern District of Washington
Robert J. McNichols, District Judge, Presiding

SUMMARY

Constitutional Law/Torts

Appeal from grant of summary judgment. Affirmed.

Appellant Paul, a disassociated member of the Jehovah's Witnesses faith, brought this action alleging common law torts of defamation, invasion of privacy, fraud, and outrageous conduct arising from the faith's requirement that its

adherents "shun" her. Under the new interpretation of the faith's rules issued by the Governing Body of Jehovah's Witnesses, members of the faith's community are prohibited from having any contact with disassociated persons and may not even greet them—"shunning." The district court granted appellees' motion for summary judgment holding that Paul's affidavits did not set forth facts that would establish a prima facie case for relief and that the court was prohibited from ruling on the issue on the ground of ecclesiastical abstention which prohibits courts from determining issues of canon law.

[1] In this case the actions of church officials and members were clearly taken pursuant to church policy. [2] Were shunning considered to be tortious conduct, the guarantee of the free exercise of religion would provide that it is, nonetheless, privileged conduct. [3] The free exercise protections of the Washington Constitution are at least as generous as those of the federal constitution. [4] The application of tort law to activities of a church or its adherents in their furtherance of their religious belief is an exercise of state power. When the imposition of liability would result in the abridgement of the right to free exercise of religious beliefs, recovery in tort is barred. [5] Permitting prosecution of a cause of action in tort would make shunning an unlawful act. [6] The practice of shunning does not constitute a sufficient threat to the peace, safety, or morality of the community as to warrant state intervention. [7] A religious organization has a defense of constitutional privilege to claims that it has caused intangible harms —in most, if not all, circumstances.

COUNSEL

Robert A. Castrodale, Coulee, Washington, for the plaintiff/appellant.

Gregory J. Arpin, Spokane, Washington, for the defendant/appellee.

OPINION

REINHARDT, Circuit Judge:

Janice Paul, a former member of the Jehovah's Witness Church, appeals from the grant of summary judgment in favor of defendants, the corporate arms of the Governing Body of Jehovah's Witnesses. Paul contends that she is being "shunned" by adherents of the Jehovah's Witness faith. She initially filed suit in state court, setting forth various tort claims. Defendants removed the action on the ground of diversity. Because the practice of shunning is a part of the faith of the Jehovah's Witness, we find that the "free exercise" provision of the United States Constitution and thus of the Washington State Constitution precludes the plaintiff from prevailing. The defendants have a constitutionally protected privilege to engage in the practice of shunning. Accordingly, we affirm the grant of summary judgment, although for reasons different from those of the district court. *See generally Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986).

I. Facts

Janice Paul was raised as a Jehovah's Witness. Her mother was very active in the Church and, from the age of four, Paul attended church meetings. In 1962, when Paul was 11 years old, her mother married the overseer of the Ephrata, Washington congregation of Jehovah's Witnesses. In 1967, Paul officially joined the Witnesses and was baptized.

According to Paul, she was an active member of the congregation, devoting an average of 40 hours per month in door-to-door distribution of the Witnesses' publications. In addition to engaging in evening home bible study, she attended church with her family approximately 20 hours per month. She eventually married another member of the Jehovah's Witnesses.

In 1975, Paul's parents were "disfellowshiped" from the Church. According to Paul, her parents' expulsion resulted

from internal discord within their congregation. The Elders of the Lower Valley Congregation told Paul that she and her husband should not discuss with other members their feeling that her parents had been unjustly disfellowshiped. That advice was underscored by the potential sanction of her own disfellowship were she to challenge the decision.

Sometime after the Elders' warning, Paul decided that she no longer wished to belong to the congregation, or to remain affiliated with the Jehovah's Witnesses. In November 1975, Paul wrote a letter to the congregation withdrawing from the Church.

The Witnesses are a very close community and have developed an elaborate set of rules governing membership. The Church has four basic categories of membership, non-membership or former membership status; they are: members, non-members, disfellowshiped persons, and disassociated persons. "Disfellowshiped persons" are former members who have been excommunicated from the Church. One consequence of disfellowship is "shunning," a form of ostracism. Members of the Jehovah's Witness community are prohibited—under threat of their own disfellowship—from having any contact with disfellowshiped persons and may not even greet them. Family members who do not live in the same house may conduct necessary family business with disfellowshiped relatives but may not communicate with them on any other subject. Shunning purportedly has its roots in early Christianity and various religious groups in our country engage in the practice including the Amish, the Mennonites, and, of course, the Jehovah's Witnesses.

"Disassociated persons" are former members who have voluntarily left the Jehovah's Witness faith. At the time Paul disassociated, there was no express sanction for withdrawing from membership. In fact, because of the close nature of many Jehovah's Witness communities, disassociated persons were still consulted in secular matters, e.g. legal or business

advice, although they were no longer members of the Church. In Paul's case, for example, after having moved from the area, she returned for a visit in 1980, saw Church members and was warmly greeted.

In September 1981, the Governing Body of Jehovah's Witnesses, acting through the defendants — Watchtower Bible and Tract Society of Pennsylvania, Inc., and the Watchtower Bible and Tract Society of New York, Inc. — issued a new interpretation of the rules governing disassociated persons. The distinction between disfellowshiped and disassociated persons was, for all practical purposes, abolished and disassociated persons were to be treated in the same manner as the disfellowshiped. The September 15, 1981 issue of *The Watchtower*, an official publication of the Church, contained an article entitled "Disfellowshiping — how to view it." The article included the following discussion:

THOSE WHO DISASSOCIATE THEMSELVES

> . . . Persons who make themselves 'not of our sort' by deliberately rejecting the faith and beliefs of Jehovah's Witnesses should appropriately be viewed and treated as are those who have been disfellowshiped for wrongdoing.

The Watchtower article based its announcement on a reading of various passages of the Bible, including 1 John 2:19 and Revelations 19:17-21. The article noted further that "[a]s distinct from some personal 'enemy' or worldly man in authority who opposed Christians, a . . . disassociated person who is trying to promote or justify his apostate thinking or is continuing in his ungodly conduct is certainly not one to whom to wish 'Peace' [understood as a greeting]. (1 Tim. 2:1, 2)." Finally, the article stated that if "a Christian were to throw in his lot with a wrongdoer who . . . has disassociated himself, . . . the Elders . . . would admonish him and, if necessary, 're-

prove him with severity.' " (citing, *inter alia*, Matt. 18:18, Gal. 6:1, Titus 1:13).

Three years after this announcement in *The Watchtower*, Paul visited her parents, who at that time lived in Soap Lake, Washington. There, she approached a Witness who had been a close childhood friend and was told by this person: "I can't speak to you. You are disfellowshiped." Similarly, in August 1984, Paul returned to the area of her former congregation. She tried to call on some of her friends. These people told Paul that she was to be treated as if she had been disfellowshiped and that they could not speak with her. At one point, she attempted to attend a Tupperware party at the home of a Witness. Paul was informed by the Church members present that the Elders had instructed them not to speak with her.

Upset by her shunning by her former friends and co-religionists, Paul, a resident of Alaska, brought suit in Washington State Superior Court alleging common law torts of defamation, invasion of privacy, fraud, and outrageous conduct. Defendants, Watchtower Bible and Tract Associations, removed the action to federal court pursuant to 28 U.S.C. § 1441 (1982). Watchtower moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim under Washington law. Fed. R. Civ. P. 12(b)(1) & (6). In the alternative, Watchtower sought summary judgment. Fed. R. Civ. P. 56(b).

The district court denied the 12(b)(1) motion to dismiss for lack of subject matter jurisdiction and the 12(b)(6) motion to dismiss for failure to state a claim, but granted the motion for summary judgment. The court ruled that it had jurisdiction over the case because the state court properly had jurisdiction originally. *See Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1431 (9th Cir. 1984). The court also held that Paul's affidavits did not set forth facts that would establish a prima facie case for relief. Moreover, the court ruled that even if the practice of shunning was actionable, the court was

prohibited from ruling on the issue on the ground of ecclesiastical abstention. That doctrine prohibits courts from determining issues of canon law. *See generally Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).[1]

II. The Plaintiff's Cause of Action

Janice Paul seeks relief against the Church and several Church officials under Washington state law and pleads various causes of action in tort. She claims in essence that the practice of shunning invades interests that the state does or should protect through its tort law.

The case is properly before the federal courts because of our

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[1]The doctrine of ecclesiastical abstention is not pertinent here. As Justice Brennan noted for the Court in *Serbian Orthodox Diocese:*

> [W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them.

426 U.S. at 709. Ecclesiastical abstention thus provides that civil courts may not redetermine the correctness of an interpretation of canonical text or some decision relating to government of the religious polity. Rather, we must accept as a given whatever the entity decides. *See id.* at 710 (Courts "must accept such decisions as final, and as binding on [us], in their application to the case before [us].") (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1872)). *Cf. United States v. Ballard*, 322 U.S. 78 (1944)(courts will not inquire as to the truth or sincerity of religious beliefs).

This limited abstention doctrine is not relevant here because Paul is not alleging that that the new rules governing disassociation are improper under Church law. (Paul has dropped her fraud claim, *cf. id.* at 713.) Nor does she seek relief for having been "wrongfully" disfellowshiped. Rather, she seeks relief for the harms she has suffered as a result of conduct engaged in by the Jehovah's Witnesses that is presumably consistent with the governing law of the Church. Accordingly, the doctrine of *Serbian Orthodox Diocese* does not apply.

diversity jurisdiction. *See* 28 U.S.C. § 1332 & 1447. When federal courts sit in diversity, we apply state law. *Erie Railroad Co. v. Thompkins*, 304 U.S. 64 (1938). Our task is complicated by the fact that there are no Washington cases considering whether a cause of action in tort exists against a church for "shunning" a former member or for engaging in comparable religious practices, although the applicability of state tort law to church practices has been the subject of recent litigation in other jurisdictions. *See Annotation, Liability of Religious Association for Damages for Intentionally Tortious Conduct in Recruitment, Indoctrination, or Related Activity*, 40 ALR 4th 1062 (1985); *Miller v. Catholic Diocese of Great Falls*, 728 P.2d 794 (Mont. 1986).

[1] We note at the outset that in this case the actions of Church officials and members were clearly taken pursuant to Church policy. *Cf. Van Schaick v. Church of Scientology of California*, 535 F. Supp. 1125, 1142 (D. Mass. 1982)(noting plaintiff's "burden to show that the actions taken against her by individual church members were taken pursuant to some Church policy, practice or directive"). Although shunning is intentional, the activity is not malum in se. The state is legitimately concerned with its regulation only to the extent that individuals are directly harmed.

One state has recently recognized a cause of action in tort arising from the practice of shunning. Although it did not purport to create a new tort, the Supreme Court of Pennsylvania, in *Bear v. Reformed Mennonite Church*, 341 A.2d 105 (1975), noted that certain interests protected by the state may be invaded when shunning occurs. As the Court stated:

> the "shunning" practice of appellee church and the conduct of the individuals may be an excessive interference within areas of "paramount state concern," i.e. the maintenance of marriage and family relationship, alienation of affection, and the tortious interference with a business relationship . . . .

Id. at 107.

Under Washington tort law there are at least three basic categories of intentional conduct that are relevant here: conduct causing emotional distress, conduct causing alienation of affections, and conduct causing harm to reputation. Paul claims to have suffered injuries in all three categories as a result of the intentional actions of the Jehovah's Witnesses. Under Washington law, "intangible-emotional" harm is, at least in some circumstances, sufficient to support a claim in tort. *See Wilson v. Lund*, 80 Wash. 2d 91, 98, 491 P.2d 1287, 1291 (1971) (" *'intangible-emotional' injuries can and do constitute real and significant harms*")(emphasis in original) (permitting damages for loss of love and companionship of dead child and for injury to or destruction of parent-child relationship); *cf. Baugh v. Thomas*, 50 N.J. 203, 265 A.2d 675, 677 (N.J. 1970) ("We believe that expulsion from a church or other religious organization can constitute a serious emotional deprivation which, when compared to some losses of property or contract rights, can be far more damaging to an individual.").

Federal courts are not precluded from affording relief simply because neither the state Supreme Court nor the state legislature has enunciated a clear rule governing a particular type of controversy. Were we able to invoke only clearly established state law, litigants seeking to protect their rights in federal courts by availing themselves of our diversity jurisdiction would face an inhospitable forum for claims not identical to those resolved in prior cases. Equally important, a policy by the federal courts never to advance beyond existing state court precedent would vest in defendants the power to bar the successful adjudication of plaintiffs' claims in cases with novel issues: defendants could ensure a decision in their favor simply by removing the case to federal court. Congress, in providing for removal, certainly did not intend to provide such a weapon to defendants.

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[2] Nonetheless, we need not decide here whether Washington courts would ultimately rule that Paul has set forth a prima facie claim for relief in tort because the defendants, in any event, possess an affirmative defense of privilege — a defense that permits them to engage in the practice of shunning pursuant to their religious beliefs without incurring tort liability. Were shunning considered to be tortious conduct, the guarantee of the free exercise of religion would provide that it is, nonetheless, privileged conduct. In theory, we could examine the question whether the shunning of a former member of a church is, in itself, tortious; however, we will follow the practice of Washington courts which safeguard the free exercise of religion through the recognition of substantive defenses to torts, rather than by negating the plaintiff's cause of action itself (i.e. ruling that the conduct in question is not tortious). *See Carrieri v. Bush*, 419 P.2d 132, 137 (Wash. 1966). The Washington practice, in addition to being the governing rule here is, in our view, the most sensible juridical approach. *See New York Times v. Sullivan*, 376 U.S. 254 (1964).

III. The Defendants' Privilege

Shunning is a practice engaged in by Jehovah's Witnesses pursuant to their interpretation of canonical text, and we are not free to reinterpret that text.[2] Under both the United States and Washington Constitutions, the defendants are entitled to the free exercise of their religious beliefs. As the Washington Supreme Court has stated, "[t]here is no question that our state constitution protects the free exercise of religious beliefs (Const. art. 1, § 11 (amendment 34))." *Carrieri v. Bush*, 419 P.2d 132, 137 (Wash. 1966).

[3] The free exercise protections of the Washington Constitution are at least as generous as those of the federal constitution. Indeed, in a decision rendered last year, the Washington

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[2] *See* n. 1, *supra*.

Supreme Court relied exclusively on federal precedent in interpreting the scope of the free exercise protections of its constitution, noting that the "parties have not argued persuasively for a different application of the provisions of the First Amendment and Const. art. 1, § 11 (amend. 34) of the State Constitution as they pertain to the [free] exercise of religion." *Backlund v. Board of Commissioners of King County Hospital*, 106 Wash.2d 632, 639 n.3, 724 P.2d 981, 985 n.3 (1986). The parties here also do not suggest any dissimilarity between the free exercise provisions of the two constitutions. Accordingly, we too will assume that they are identical and will base our conclusion as to the meaning of the Washington Constitutional provisions on our understanding of the parallel provision of the First Amendment. *Cf. Examining Board of Engineers v. Flores de Otero*, 426 U.S. 572, 597-98 (1976).[3]

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[3]We note that some Washington state constitutional protections are more strict than their federal counterparts. For example, Washington applies a much more stringent standard in determining whether a state regulation violates the state's "establishment clause." *See Witters v. State Comm'n for the Blind*, 102 Wash.2d 624, 689 P.2d 53, 55 (1984)("our state constitution requires a far stricter separation of church and state than the federal constitution); *cf. Bering v. SHARE*, 106 Wash.2d 212, 721 P.2d 918, 931 (1986)(requiring higher standard to justify state restriction of time, place, and manner restrictions on free speech). As we note in the text, the parties here have not argued for a stricter interpretation of the scope of the state protections of the free exercise of religion. *See, e.g., Sumner v. First Baptist Church*, 97 Wash.2d 1, 639 P.2d 1358 (1982); *Bolling v. Superior Court for Clallam County*, 133 P.2d 803 (1943)(ruling after *Minersville School District v. Gobitis*, 310 U.S. 586 (1940) but before *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), that the free exercise protections of the Washington Constitution preclude conditioning attendance at public school on flag salutation).

States are, of course, free to interpret the provisions of their constitutions as being more protective of individual rights than are the comparable provisions of the federal constitution. The California Supreme Court has done so for a number of years. *See, e.g., Serrano v. Priest*, 5 Cal.3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601, 41 ALR 3d 1187 (Cal. 1971). Most recently, the Oregon Supreme Court held that all speech is protected under the state constitution including speech that would be considered obscene for purposes of the first amendment of the United States Constitution. *State v. Henry*, 302 Or. 510, 732 P.2d 9 (Or. 1987).

[4] State laws whether statutory or common law, including tort rules, constitute state action. In *New York Times Company v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court ruled that state libel laws are subject to the constraints of the first amendment. "The test," according to the Court, "is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." 376 U.S. at 265. *See also Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936-40 (1982); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *American Federation of Labor v. Swing*, 312 U.S. 321 (1941). For purposes of this test, we see no difference between libel and other forms of torts. Clearly, the application of tort law to activities of a church or its adherents in their furtherance of their religious belief is an exercise of state power. When the imposition of liability would result in the abridgement of the right to free exercise of religious beliefs, recovery in tort is barred.

The Jehovah's Witnesses argue that their right to exercise their religion freely entitles them to engage in the practice of shunning. The Church further claims that assessing damages against them for engaging in that practice would directly burden that right.

We agree that the imposition of tort damages on the Jehovah's Witnesses for engaging in the religious practice of shunning would constitute a direct burden on religion. The free exercise claim here is unlike the one in *Braunfeld v. Brown*, 366 U.S. 599 (1960). In *Braunfeld*, the United States Supreme Court upheld Sunday closing laws even though it acknowledged that Sunday closings made the practice of their religious beliefs more expensive for Saturday Sabbatarians, by forcing them to close their businesses two days a week — Saturday (per religious compulsion) and Sunday (per state compulsion). In upholding the Pennsylvania statute, the Court stated that "to strike down . . . legislation which imposes only an indirect burden on the exercise of religion, i.e. legislation which does not make unlawful the religious practice itself,

would radically restrict the operating latitude of the legislature." *Id.* at 606.

As the Court analyzed the issues in *Braunfeld*, the direct burden imposed by the statute — Sunday closing and the financial losses attributable thereto — fell equally on all persons. That the closing, in the end, had a greater adverse impact on Saturday Sabbartarians was, in the Court's view, an indirect result of the fact that members of those religions closed their places of business on Saturdays as well. In the Court's view, the law did not regulate or prohibit Saturday closings, (in which case it would have constituted a direct burden on Saturday Sabbatarians) but only Sunday operations. From this, the Court concluded that the statute did not directly regulate or prohibit a religious practice (Saturday closings) but merely regulated a non-religious one (Sunday business operations); accordingly, any effect on the religious practice was, in the Court's view, "indirect."[4]

[5] Here, by contrast, shunning is an actual practice of the Church itself, and the burden of tort damages is direct. Permitting prosecution of a cause of action in tort, while not criminalizing the conduct at issue, would make shunning an "unlawful act." *Langford v. United States*, 101 U.S. 341, 345 (1879)("[T]he very essence of a tort is that it is an unlawful act."). Imposing tort liability for shunning on the Church or its members would in the long run have the same effect as prohibiting the practice and would compel the Church to abandon part of its religious teachings. Were we to permit recovery, " 'the pressure . . . to forego that practice [would be] unmistakeable.' " *Thomas v. Review Board*, 450 U.S. 707, 717 (1981)(quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).

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[4]The reasoning of *Braunfeld* has been substantially undermined by subsequent cases. *See, e.g., Hobbie v. Unemployment Comm'n*, 107 S. Ct. 1046 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963). In any event, for reasons set forth in the text immediately following, *Braunfeld* is not controlling.

The Church and its members would risk substantial damages every time a former Church member was shunned. In sum, a state tort law prohibition against shunning would directly restrict the free exercise of the Jehovah's Witnesses' religious faith.[5]

In *Cantwell v. Connecticut*, the Supreme Court faced a claim of a direct burden on religion. 310 U.S. 296 (1940). There, the appellant, also a Jehovah's Witness, was convicted of inciting a breach of the peace. Cantwell had stopped two men on the street and asked their permission to play a phonograph record entitled "Enemies." The record was a general attack on organized religions, in particular the Roman Catholic Church. Upon listening, the two men were highly offended: "one of them said he felt like hitting Cantwell and the other that he was tempted to throw Cantwell off the street." *Id.* at 309. Although Cantwell's conduct did not in itself breach the peace, the reaction it produced — and had been likely to produce — was a violation of the law.

In finding the conviction of Cantwell to be barred by the first amendment, the Court recognized that "[i]n every case the power to regulate [religious conduct] must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom [of the exercise of religion]." *Id.* at 304. The Supreme Court noted that there had been "no assault or

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[5]At oral argument, both counsel seem to agree on the principle that if the behavior of the religious organization in question were criminal, the state would have a sufficient interest to overcome first amendment protections. This position is clearly incorrect. Whether a state labels a particular type of behavior criminal or whether it enables private citizens to enforce substantive rules of behavior through tort laws is not dispositive of the constitutional question. As the Supreme Court noted in *New York Times v. Sullivan*, "we are compelled by neither precedent nor policy to given any . . . weight to . . . 'mere labels' of state law." 376 U.S. at 269. *See also McDaniel v. Paty*, 435 U.S. 618, 627 n.5 (1978) (noting that the Court will "consider" the state's application of a label, although "we are not bound by it"). The constitutional analysis always entails an examination of the interest behind the state regulation — whether criminal, administrative, or tort.

threatening of bodily harm." *Id.* at 310. It held that the intangible harms caused by the exercise of Cantwell's religious belief were insufficient to justify the imposition of civil or criminal liability. The Court ruled that the state had failed to demonstrate that there was a "clear and present menace to public peace and order as to render [Cantwell] liable to conviction of the common law offense in question." *Id.* at 311.

In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Supreme Court once again struck down a burden on the free exercise of religion. The Court began its analysis by noting that in previous cases where it had upheld the imposition of burdens on the right to exercise religious beliefs freely the "conduct or actions so regulated have invariably posed some substantial threat to public safety, peace, or order." *Id.* at 403. Similarly, the Supreme Court reiterated its view that "(o)nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Id.* at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). More directly, the Court expressed its disapproval of state action similar to that which the plaintiff seeks here: "a fine imposed against appellant for her Saturday worship." *Id.* at 404. In *Sherbert*, what the Court termed a "fine" was only a denial of public benefits; here, the "fine" is actual money damages.[6]

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[6]We note that doctrinal development after *Sherbert* has been premised on the fact that the direct/indirect distinction is not controlling; rather, courts have looked to the effect of the regulation on the free exercise of religious beliefs in order to determine whether a burden exists. Professor Nowak and his collegues state the rule as follows: "Conditioning a significant benefit upon conduct prohibited by a religious belief places a substantial burden on the individual regardless of whether the burden can be labeled direct or indirect." J. Nowak, R. Rotunda, & J. Young, Constitutional Law 1062 (2d ed. 1983). The emergence of this analytic approach has substantially undermined the vitality of the Court's analysis in *Braunfeld*.

Many courts have read *Sherbert* and subsequent cases as requiring the creation of an exemption to rules governing eligibility for public benefits where a religious person cannot, consistent with his religion, qualify for public assistance. According to this view, where an otherwise valid state

[6] We find the practice of shunning not to constitute a sufficient threat to the peace, safety, or morality of the community as to warrant state intervention. The test for upholding a direct burden on religious practices is as stringent as any imposed under our Constitution. Only in extreme and unusual cases has the imposition of a direct burden on religion been upheld. *See, e.g., Reynolds v. United States*, 98 U.S. 145 (1878)(polygamy); *Hill v. State*, 38 Ala. App. 404, 88 So.2d 880 (1956) (snake handling). The harms suffered by Paul as a result of her shunning by the Jehovah's Witnesses are clearly not of the type that would justify the imposition of tort liability for religious conduct. No physical assault or battery occurred. Intangible or emotional harms cannot ordinar-

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regulation creates a burden on the free exercise of religion, the state is required to demonstrate both that the regulation serves an unusually important interest and that granting an exemption for the religious objector (and his coreligionists) would "do substantial harm to that interest." L. Tribe, American Constitutional Law § 14-10, at 851-59. *See EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1279 (9th Cir. 1982); *cf. Bucklund*, 724 P.2d at 986 (formulating similar standard). *See also Goldman v. Weinberger*, 106 S. Ct. 1310, 1325 (1986) (O'Connor, J., dissenting) ("[G]overnment must show that the opposing interest it asserts is of especial importance before there is any chance that its claim can prevail [and] . . . that the interest asserted will in fact be substantially harmed by granting the type of exemption requested by the individual."). The state must show that uniform application of its rule is the least drastic means available for the regulation's enforcement. *See, e.g., Callahan v. Woods*, 736 F.2d 1269, 1272 (9th Cir. 1984)("the 'least drastic means' inquiry . . . is the critical aspect of the free exercise analysis."). *Cf. Hobbie*, 107 S. Ct. at 1049 ("[I]nfringement [on free exercise] must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest.").

We do not think the exemption inquiry undertaken in benefits cases is particularly appropriate for claims that the state is directly burdening religion by prohibiting a practice of a religious organization through the creation of substantive rules of law — be they statutory or common law. However, were we to follow the exemption approach in Paul's case, we would make the same analysis and reach the same result we do in the text. From a practical standpoint, in most free exercise cases it is of no significance which of the two methods of inquiry is employed.

ily serve as a basis for maintaining a tort cause of action against a church for its practices — or against its members. *Cf. West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 646 (1943)(Murphy, J., concurring)("[T]he benefits that may accrue to society from the compulsory flag salute are [not] sufficiently definite and tangible to justify the invasion of freedom and privacy that is entailed."). Offense to someone's sensibilities resulting from religious conduct is simply not actionable in tort. *See Cantwell*, 310 U.S. 296; *cf. Cohen v. California*, 403 U.S. 15 (1971). Without society's tolerance of offenses to sensibility, the protection of religious differences mandated by the first amendment would be meaningless.

[7] A religious organization has a defense of constitutional privilege to claims that it has caused intangible harms — in most, if not all, circumstances.[7] As the United States Supreme Court has observed, "[t]he values underlying these two provisions [of the first amendment] relating to religion have been zealously protected, sometimes even at the expense of others interests." *Yoder*, 406 U.S. at 214.

Providing the Church with a defense to tort is particularly appropriate here because Paul is a former Church member. Courts generally do not scrutinize closely the relationship among members (or former members) of a church. Churches are afforded great latitude when they impose discipline on members or former members. We agree with Justice Jackson's view that "[r]eligious activities which concern only

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[7]We also note that Paul has not presented evidence of actual malice sufficient to overcome the constitutional privilege afforded the defendants. While the privilege is a qualified one, the only evidence Paul has presented is that Church members have shunned her at the direction of the Church; she has neither alleged nor shown that members of the Church hierarchy were motivated by reasons unrelated to their interpretation of the dictates of their religion. *Cf. Jones v. Wolf*, 443 U.S. 595 (1979); *Turner v. Unification Church*, 473 F. Supp. 367 (D.R.I. 1978), *aff'd*, 602 F.2d 458 (1st Cir. 1979).

members of the faith are and ought to be free — as nearly absolutely free as anything can be." *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944)(concurring).

The members of the Church Paul decided to abandon have concluded that they no longer want to associate with her. We hold that they are free to make that choice. The Jehovah's Witnesses' practice of shunning is protected under the first amendment of the United States Constitution and therefore under the provisions of the Washington state constitution.

VI. Conclusion

We affirm the district court's grant of summary judgment in favor of the defendants, Watchtower Bible Societies of New York and Philadelphia. Although we recognize that the harms suffered by Janice Paul are real and not insubstantial, permitting her to recover for intangible or emotional injuries would unconstitutionally restrict the Jehovah's Witnesses free exercise of religion. The First Amendment of the United States Constitution and therefore the protections of the Washington Constitution provide the Jehovah's Witnesses' with a defense to the plaintiff's cause of action — the defense of privilege. The constitutional guarantee of the free exercise of religion requires that society tolerate the type of harms suffered by Paul as a price well worth paying to safeguard the right of religious difference that all citizens enjoy.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JANICE PAUL, Plaintiff,	)	NO. C-84-826
v.	)	
WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; *et al*,	)	ORDER
Defendants.	)	

Defendants' Motion for Summary Judgment was granted by Order entered June 18, 1985. It appearing that said Order disposes of all claims raised herein, it is hereby

ORDERED that:

(1) This action is DISMISSED.
(2) The Clerk shall enter judgment accordingly.
DONE BY THE COURT THIS 19th day of June, 1985.

Robert J. McNichols
United States District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JANICE PAUL, a/k/a/ JANICE PEREZ, Plaintiff, v. WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; WATCHTOWER BIBLE AND TRACT SOCIETY OF PENNSYLVANIA; TROY A. MERTELL and the marital community composed of TROY A. MERTELL and JANE DOE MERTELL, husband and wife; and ORVILLE CROSSWHITE and the marital community composed of ORVILLE CROSSWHITE and JANE DOE CROSSWHITE, husband and wife, Defendants.	)	NO. C-84-826 ORDER

In this unique diversity action, plaintiff seeks to recover on alternative theories of defamation and fraud against various officers and hierarchical organizations of the Watchtower Society. Briefly stated, Ms. Paul was a member of the Church from early childhood in the Wapato, Washington area. Becoming increasingly disenchanted with internecine politics, she submitted her resignation in 1975. Local Elders made several attempts to contact her to discuss the matter, and receiving no reply, ultimately removed her from the roles in 1978. Ms. Paul contends, and that assertion will be taken as true, that she made inquiry prior to resigning as to what collateral consequences, if any, she would face. She was advised only that she would be deemed a "worldly person," i.e., a non-believer; but that she would not suffer the same ostracism which would befall

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one who is "disfellowshipped, i.e., one who is involuntarily excommunicated.

Plaintiff had left the area shortly after resigning. When she returned for a visit in 1980, she met with former friends and nothing untoward occurred. In September of 1981, the official Church publication, The Watchtower, contained an article clarifying the Church's position on voluntary resignation. Henceforth, such persons were to be considered in the same league as those who had been involuntarily disfellowshipped. The theological import was that those individuals who repudiated the faith were deemed to be the moral equivalent of those who had been found not worthy to remain members. The practical import was that such individuals were to be "shunned." That is, no member in good standing could have any social intercourse with persons such as plaintiff.

Ms. Paul again returned to the Wapato area in 1984. At that point, her former friends refused to have anything to do with her. Plaintiff sought an explanation from Mr. Mertell, an Elder in the Church and a defendant herein, who asked whether she had been disfellowshipped for fornication. Ms. Paul explained the circumstances, whereupon she was advised that the Church's teaching had changed since 1975. She approached another Elder, Mr. Crosswhite, who offered the same explanation. This suit followed shortly thereafter.

Defendants have pending alternative motions for dismissal under FRCP 12(b) (1) for lack of jurisdiction and 12 (b) (6) for failure to state a claim for which relief can be granted, as well as a motion for summary judgment. The gist of supporting arguments is that the claims asserted are not cognizable under Washington law in their present posture, and even if they were, they would be barred by reason of the Ecclesiastical Abstention Doctrine grounded in the First and Fourteenth Amendments.

From a procedural standpoint, the 12(b) (1) motion will be denied. In a diversity action such as this, the Court stands in the shoes of the state court from which the action was removed under the theory of derivative jurisdiction. See generally, Salveson v. Western States Bankcard

Ass'n, 731 F. 2d 1423, 1431 (9th Cir. 1984). In other words, while a federal court is generally a forum of limited jurisdiction (see Jones v. Giles, 741 F. 2d 245, 248 (9th Cir. 1984), it assumes the mantle of the state court's general jurisdiction by virtue of removal. The 12(b) (6) motion will also be denied as the Court has gone beyond the pleadings and taken cognizance of the affidavits and exhibits offered by both plaintiff and defendants. See FRCP 12(b).

In addressing the remaining motion for summary judgment, we will first consider the essential elements of the common law claims and then, only if necessary, the extent to which application of ecclesiastical abstention might be appropriate.

Defamation:

Defamation, and its associated tort of invasion of privacy, require publication. That is, the untrue statement, or the unreasonable disclosure of a private event, must be made public in order to be actionable. In the case of libel and slander, at a bare minimum, publication requires disclosure to a third party. See, e.g., Lunz v. Neuman, 48 Wn. 2d, 26, 33, 290 P.2d 697 (1955). In the case of invasion of privacy, the publication must involve actual "publicity"; i.e., widespread disclosure. Restatement of Torts (2d) §§ 652D & E.[1] Plaintiff seeks to ground her action on three events: (1) Mr. Mertell's reference to fornication; (2) the official announcement of her resignation in 1978; and (3) the somewhat vituperative descriptions contained in the Watchtower in 1981.

With regard to the Mertell incident, obviously there was no publication. The remark at issue, while untrue and no doubt offensive, was a private communication between the Elder and the plaintiff. That it became public as a result of this lawsuit certainly cannot be ascribed to the actions of the defendants. Lunz v. Neuman, supra, 48 Wn. 2d at 33. With regard to the 1978 notice, it contains no untrue or offensive language. Rather, it is merely a neutral announcement that Ms. Paul had voluntarily resigned. With regard to the Watchtower article in 1981, the issue must be resolved with reference to ecclesiastical abstention.

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Fraud:

In an interesting juxtaposition, plaintiff claims that the 1981 announcement represented a radical shift in pre-existing dogma. Defendants, on the other hand, argue that the Church had long held such a position, and that the 1981 article was merely a "codification" of well-settled teaching. Plaintiff's fraud claim would be far easier to analyze were the parties' positions reversed. That is, if in fact official Church policy was to shun fallen-away members as early as 1975, and if certain Elders misled plaintiff into believing she would be considered merely a "worldly person" upon resigning, then as against such Elders, at least, Ms. Paul might be able to state a facially valid claim. As it is, however, an essential element is lacking in that the purported misrepresentation was not one of an existing fact. See, e.g., North Pac. Plywood v. Road Builders, 29 Wn. App. 228, 231-2, 628 P.2d 482, rev. denied, 96 Wn. 2d 1002 (1981). Rather, such representations on the subject as might have been made to Ms. Paul in 1975 became untrue only after the passage of some six years. If and when the law recognizes an action for "negligent failure to accurately prognosticate future church theology," we would have a different case. As matters now stand, plaintiff has failed to state a claim for either common law fraud or negligent misrepresentation.

Ecclesiastical Abstention:

In its most recent treatment of the subject, the United States Supreme Court restated the rule emanating from Watson v. Jones, 80 U.S. (13 Wall,) 679 (1871):

> "The law knows no heresay, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an

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> implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for."

Serbian Orthodox Diocese v. Milovojevitch, 426 U.S. 696, 710-11 (1976) quoting Watson, supra (emphasis deleted).

While plaintiff in the instant action seeks to hold decisions of such genre to matters involving property disputes controlling language is not supportive. Civil actions to which the abstention doctrine is applicable include:

> [any] matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.

Id. at 714 (emphasis deleted).

Plaintiff seeks to distinguish the foregoing on the basis that she is no longer a church member and thus defendants have lost the disciplinary power which may be used against members. The difficulty with accepting this proposition is that it is highly unlikely that the Church cares a whit about plaintiff. The obvious motivation, rather, is to maintain discipline over the ranks of those persons who still remain within the membership. To embrace plaintiff's argument that her voluntary severance ties the hands of the Church in maintaining discipline over the balance of the congregation necessarily assumes that a single individual may effectively frustrate the teachings of an entire religion simply by opting out of its membership. Not surprisingly, no authority has been offered for this contention.

Rather, notwithstanding the fact that Ms. Paul has withdrawn her consensual relationship and thus her implied acquiescence in submitting to Church discipline, this is, to put it colloquially, a situation in which one "takes the hair with the hide" by assuming the risk that a once-embraced religion may undergo shifts in theological dogma.

Plaintiff further seeks to distinguish her case on the strength of various decisions which have held that while a church may be privileged to believe anything it chooses to, such privilege does not necessarily attach to putting those beliefs into action; and most certainly does not attach to the commission of tortious activity. Such decisions, however, invariably involve aggressive, overt interference with matters over which the state may properly assume a paramount interest predicated upon public welfare or safety. For example, a church is not privileged to routinely assault fallen-away members, or to torch their homes, or disseminate defamatory material.

What Ms. Paul alleges is activity of a far more subtle nature. Essentially, the gravamen of her action is that people won't talk to her. If there exists a "right to be talked to," neither the parties nor the Court are entirely certain of its foundation.

In fairness to the parties, the practical import underlying the policy considerations behind the ecclesiastical abstention doctrine should probably be discussed. Beyond the Founding Fathers' powerful views on the need for separation of church and state as expressed in the First Amendment, lies the conceptual unsuitability of civil courts to deal with those matters "not of this world." See, e.g., Serbian Orthodox Diocese, supra, 426 U.S. at 714 n.8; United States v. Ballard, 322 U.S. 78, 86-87 (1944). Would the success of the instant suit pave the way for deciding whether various male-dominated churches operating in this State can validly withhold the priesthood from women in the view of the Washington State Equal Rights Amendment? Would churches which have in the past questioned the eligibility of certain races for entry into heaven be required to implement affirmative action programs, perhaps quota-based, to facilitate such entry? The Court is not

being facetious. If the instant action would fly, so would the hypotheticals.

The plain fact of the matter is that there has never been a requirement, and hopefully never will be, that theological teachings must be gauged against an objective standard of rationality, or that the fundamental fairness doctrine inhere in church policy. Just as the civil law has yet to incorporate the Ten Commandments, so church law need not incorporate the Constitution. It is enough that a church, in carrying its beliefs to fruition, not imperil the public safety or welfare. The activity complained of in the suit at bar does not.

THEREFORE IT IS ORDERED that:

(1) Defendants' Motion for Summary Judgment is GRANTED.

(2) The Clerk shall enter judgment accordingly.

DONE BY THE COURT this 16th day of June, 1985.

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ROBERT J. McNichols
United States District Judge

1. It would appear that Washington courts have had occasion thus far to construe only § 652B which deals with invasion of privacy by reason of intrusion. Mark v. Seattle Times, 96 Wn. 2d 473, 635 P. 2d 1081 (1981), cert. denied, 457 U.S. 1124 (1982). Mark suggests, however, that Washington would recognize any of the four bases of an action for invasion of privacy as set forth in § 652A et seq.: intrusion, disclosure, false light, and appropriation. Id. at 497.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

JANICE PAUL, a/k/a JANICE PEREZ, Plaintiff, vs. WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., WATCHTOWER BIBLE AND TRACT SOCIETY OF PENNSYLVANIA, TROY A. MERTELL, *et ux, et al,* Defendants	)	NO. C 84-826-RJM AFFIDAVIT OF M. JAMES PENTON ON BEHALF OF PLAINTIFF

Sworn before me at the Town of Coronach
in the Province of Saskatchewan
this 13th day of May, 1985
Cecil L. Keast, C.G.A.
A Notary Public in and for
the Province of Saskatchewan
My appointment expires
December 31, 1990

SEAL

I, M. James Penton, Ph. D., being duly sworn, am a Professor of History at the University of Lethbridge, Lethbridge, Alberta, Canada. My primary fields of teaching and scholarship are church history and religion and law. In addition, I am an expert in the history of Jehovah's Witnesses. Over the last twelve years, I have written two books on Jehovah's Witnesses - Jehovah's Witnesses in Canada (Toronto: Macmillan of Canada, 1976) and Apocalypse Delayed: The Story of Jehovah's Witnesses (Toronto: University of Toronto Press, 1985) - plus having produced some seven published articles and numerous academic papers on the same subject.

My interest in Jehovah's Witnesses arose from having been raised in that religion and having been an active member thereof from 1948 to 1980. During those years I held, at various times, practically every appointed congregational office within the various Jehovah's witness congregations with which I served in the United States, Puerto Rico, Canada and Spain, plus having acted in other special capacities on behalf of the Watch Tower Bible and Tract Society, the incorporated body through which Jehovah's Witnesses are governed. On at least two occasions I was asked to write articles for the magazine Awake! . From 1973 to 1980 I was an elder in the Lethbridge Galt Park and Lakeview congregations of Jehovah's Witnesses and was therefore thoroughly familiar with the rules and regulations by which Jehovah's Witnesses in general were governed.

On the basis of the above, I affirm that prior to September 1981 there was no published or unpublished rule among Jehovah's Witnesses which held that persons who resigned from that religion should be treated as excommunicated or disfellowshipped. Neither was there any rule which instructed Jehovah's Witnesses in "good standing" to shun such persons—ordinarily referred to as "disassociated persons"—until such a rule was published in The Watchtower magazine of September 15, 1981. Furthermore, it was generally known that prior to that date various Jehovah's Witnesses in "good standing" continued to use the services of professional persons who had "disassociated" themselves through resignation and that Jehovah's Witness elders in various places would inform persons contemplating such resignation that they would not be treated as disfellowshipped or be shunned if they did resign. Consequently, prior to September 1981, persons who resigned from Jehovah's Witnesses were treated by their former religious associates as members of the general public and not as grossly immoral persons.

Since September 1981 the Governing body of Jehovah's Witnesses, acting through the Watch Tower Bible and Tract Society of Pennsylvania and the Watchtower Bible and Tract Society of New York, Inc., has ordered all Jehovah's Witnesses in good standing to shun persons who have resigned from their religion as virtually dead, "not even greeting them." This

policy has had a serious, often terrible, effect on the lives of many persons, frequently separating parents from children, brothers and sisters and long-standing friends from one another. Since Jehovah's Witnesses are a tight, sectarian community, this generally means that individuals who resign from them are cut off from their traditional roots and all childhood associations. Furthermore, as so-called "apostates," they are described among Jehovah's Witnesses as immoral, frequently being classified with "thieves, drunkards, prostitutes, adulterers and flesh defilers."

From statements published in Watch Tower Literature, Watch Tower correspondence which I have in my possession and from taped official statements made at Watch Tower conventions, I believe the policy of shunning "disassociated" persons is (1) to isolate all dissenters and critics of Watch Tower teachings and policies from Jehovah's Witnesses who have been instructed to avoid "apostate wolves" on pain of disfellowshipment and (2) to punish anyone who has been a Jehovah's Witness for denying that the Witness organization is God's sole channel of salvation for mankind today.

By such shunning and by the attempt to picture all "disassociated" former Jehovah's Witnesses as immoral persons, the Governing Body of Jehovah's Witnesses is using a form of ecclesiastical coercion to prohibit individuals from exercising their legal right to dissociate themselves from a supposedly voluntary religious organization. From careful academic research into dozens of cases where such shunning has occurred, I know personally how psychologically, sociologically and financially devastating it can be to "disassociated" persons and what a serious impact it can have on their physical health as well.

Signed

M. James Penton

Supreme Court, U.S.
FILED
SEP 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-385

In The

Supreme Court of the United States

October Term, 1987

JANICE PAUL, a/k/a JANICE PEREZ,
Petitioner,

v.

WATCHTOWER BIBLE AND TRACT SOCIETY
OF NEW YORK, INC., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Is the Jehovah's Witnesses' practice of shunning protected under the free exercise provisions of the United States Constitution and the Washington State Constitution?

a. Would imposition of tort liability for intangible or emotional harms caused by the religious practice of shunning burden the free exercise of religion?

b. Does the religious practice of shunning constitute a sufficient threat to the peace, safety, or morality of the community as to warrant imposition of tort liability for intangible or emotional harm caused by the practice?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner Janice Paul, a/k/a Janice Perez and the respondents, Watchtower Bible and Tract Society of New York, Inc.; Watchtower Bible and Tract Society of Pennsylvania; Troy A. Mertell and Jane Doe Mertell; Orville Crosswhite and Jane Doe Crosswhite.

Respondent Watchtower Bible and Tract Society of New York, Inc., has no other parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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No.87-385

In The

Supreme Court of the United States

October Term, 1987

JANICE PAUL, a/k/a JANICE PEREZ,
Petitioner,

v.

WATCHTOWER BIBLE AND TRACT SOCIETY
OF NEW YORK, INC., et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 819 F.2d 875 (9th Cir. 1987).

STATEMENT OF FACTS

For the purposes of this brief in opposition, the respondents incorporate by reference the statement of facts found in the Ninth Circuit's opinion.

REASONS WHY THE PETITION SHOULD BE DENIED

1. *There are no special and important reasons for granting the petition.*

The Ninth Circuit's decision is not in conflict with the decision of another federal court of appeals or a state court of last resort on the same matter. Moreover, this case does not involve an important question of federal law which has not previously been settled by the Supreme Court. Nor is it in conflict with applicable decisions of the Supreme Court. On the contrary, the issue of the free exercise of religion has been thoroughly addressed in

previous decisions by the Supreme Court. *Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Gillette v. U.S.,* 401 U.S. 437 (1971); *Sherbert v. Verner,* 374 U.S. 398 (1963); *Prince v. Massachusetts,* 321 U.S. 158 (1944); *Murdock v. Pennsylvania,* 319 U.S. 105 (1942); *Cantwell v. Connecticut,* 310 U.S. 296 (1940); *Hamilton v. Regents of the University of California,* 293 U.S. 245 (1934); *Davis v. Beason,* 133 U.S. 333 (1890); *Reynolds v. U.S.,* 98 U.S. 145 (1879). The Ninth Circuit's decision in this matter is in accord with the Supreme Court's decisions in those cases.

2. *The Ninth Circuit Court of Appeals was correct in deciding that the imposition of tort liability for intangible or emotional injuries resulting from the religious practice of shunning would unconstitutionally restrict the free exercise of religion.*

The court of appeals held the practice of shunning did not constitute a sufficient threat to the peace, safety, or morality of the community as to warrant state intervention through the imposition of tort liability. Although the petitioner naturally disagrees with the conclusion reached by the court of appeals, she presents no authority in her petition to demonstrate the decision was in error. On the contrary, the Ninth Circuit correctly decided the case on the basis of established precedent from the Supreme Court.

The first amendment to the Constitution of the United States provides, in part:

> Congress shall make no law . . . prohibiting the free exercise [of religion] . . .

This amendment is applicable to the states through the due process clause of the 14th amendment. *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940). Further, as noted by the court of appeals, "state laws whether statutory or common law, including tort rules, constitute state action." *Paul v. Watchtower Bible and Tract Society of New York,* 819 P.2d 875, 880 (9th Cir. 1987).

The free exercise clause operates to protect not only individuals but also churches. *Presbyterian Church v. Mary Elizabeth Blue Hall Presbyterian Church,* 393 U.S. 440 (1969); *Kreshik v. St.*

Nicholas Cathedral, 363 U.S. 190 (1960); *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 116 (1952). But, while its protection to believe is absolute, its protection of freedom to act is not. *Wisconsin v. Yoder,* 406 U.S. 205, 220 (1972). Since the petitioner's claim for relief is the imposition of tort liability upon the Jehovah's Witnesses church and its members due to their practice of shunning, the Ninth Circuit correctly set out to determine whether the Jehovah's Witnesses' freedom to act is protected under the free exercise provisions of the Federal and State Constitution. The circuit court was guided in this inquiry by previous decisions of the Supreme Court concerning the free exercise of religion.

The Supreme Court, in *Sherbert v. Verner,* 374 U.S. 398 (1963), described the test which governmental action, burdening the free exercise of religion, must meet. Such an imposition must be justified by a "compelling state interest in the regulation of a subject within the state's constitutional power to regulate." *Sherbert,* 374 U.S. at 403. In that case, the Supreme Court expounded upon the concept of compelling state interest as follows:

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

Sherbert v. Verner, 374 U.S. 398, 406 (1963), (quoting *Thomas v. Collins,* 323 U.S. 516, 530 (1945))

In applying the *Sherbert* test here, the court of appeals made the following inquiries:

1. Would the imposition of tort liability burden the free exercise of religion by the Jehovah's Witnesses?
2. If so, is such a burden justified because of a compelling state interest?

The court of appeals correctly determined that the imposition of tort liability would burden the free exercise of religion by the Jehovah's Witnesses in this case.

It should be noted, as was observed by the court of appeals, that shunning is an important and integral part of the teaching and practice of the Jehovah's Witnesses. This practice has its roots in various passages of Christian scripture. See *Paul v. Watchtower Bible and Tract Society of New York,* 819 F.2d 875, 877 (9th Cir. 1987). The practice is indeed a doctrine which is basic and essential to the beliefs of the Jehovah's Witnesses. Although petitioner alleges there is more to be seen behind the doctrine of shunning than a religious motive, as the court of appeals noted in footnote 7, it was "neither alleged nor shown that members of the church hierarchy were motivated by reasons unrelated to their interpretation of the dictates of their religion." 819 F.2d at 883.

Petitioner's suggestion that the Jehovah's Witnesses' position on this subject is motivated by some malice they allegedly have toward her is unfounded. As the district court stated: "[I]t is highly unlikely that the Church cares a whit about plaintiff. The obvious motivation, rather, is to maintain discipline over the ranks of those persons who still remain within the membership." Appendix to petitioner's brief at 35. That the teachings and actions with respect to disassociated persons are based on scripture was accepted by the Ninth Circuit as well. *Paul,* 819 F.2d at 879.

The affidavit of James Penton, relied upon by petitioner, establishes nothing. Petitioner chooses to draw "inferences" of malice from Penton's opinions, but ignores the clear scriptural basis of the shunning practice.

The petitioner's statement that the Church's "motives are more organizational than spiritual" makes no sense. The Church is a recognized, theocratic organization motivated by its spiritual commission. There is no distinction between its organizational and spiritual actions, especially when applying scriptural teachings. In short, the conduct petitioner attacks is based unquestionably on scripture and is engaged in by persons who voluntarily accept that scriptural teaching and put it into practice.

Having in mind the central nature and purpose of the shunning policy, the court of appeals was likewise correct in determining that the imposition of tort liability would *directly* interfere with the free exercise of religion by the Church and its members.

Paul, 819 F.2d at 880. If the Church must be made to pay in damages for carrying out its essential teachings and practices, its religious liberty and that of its members are as unreasonably burdened as they would be by an injunction or a criminal penalty. The only difference would be in the form of the penalty, not in the substance.

Having determined that the imposition of tort liability upon the Church and its members would be a substantial burden upon their religious freedom, the court of appeals turned to whether such a burden would be justified because of a "compelling state interest."

As stated earlier, the liberty to act in the name of religion is not absolute. Churches and their members do not have an absolute right to carry their religious beliefs into practice, regardless of how central these beliefs may be to their religion or how sincerely they may hold these beliefs. Religious liberty is nevertheless a "preferred freedom" under our Constitution. *Murdock v. Pennsylvania,* 319 U.S. 105, 115 (1943). As a result, the Court has required that any interference with that freedom be justified only by showing that the religious practice in question is in the category of "the gravest abuses, endangering paramount interests." *Sherbert v. Verner,* 374 U.S. 398, 406 (1960) (Quoting *Thomas v. Collins,* 323 U.S. 516, 530 (1945)). As the court of appeals pointed out, those cases in which restrictions by governmental bodies upon religious practices have been upheld are very few. *Paul v. Watchtower Bible and Tract Society of New York,* 819 F.2d 875, 883 (9th Cir. 1987). They are illustrative of the extreme ends to which religious practices must go before restrictions upon them will be approved.

A landmark case of the Supreme Court on this issue is *Reynolds v. U.S.,* 98 U.S. 145 (1979). There the Court upheld a criminal conviction for polygamy.

In another case involving polygamy, *Davis v. Beason,* 133 U.S. 333 (1890), the Court described those situations in which religious liberty could be limited as those involving "acts inimical to the peace, good order and morals of society." *Davis,* 133 U.S. at 342.

In *Prince v. Massachusetts,* 321 U.S. 158 (1944), the Court upheld, over free exercise objections, the criminal conviction of a Jehovah's Witness for violation of the child labor laws by utilizing a nine year old girl to sell religious tracts on the public streets as part of a religious ministry. The Court pointed to the evils of "...the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street." *Prince,* 321 U.S. at 169.

In addition, the Supreme Court has recognized permissible limitations on religious activity in cases closely related to the national defense. *Gillette v. United States,* 401 U.S. 437 (1971); *Hamilton v. Regents of the University of California,* 293 U.S. 245 (1934).

The Jehovah's Witnesses' practice of shunning for which the petitioner seeks to impose tort liability is far removed from the type of religious activity which the Supreme Court has held may be precluded or limited. What is present here, at most, is a private intangible injury resulting from religious beliefs and practices which have their effect, not upon the public as a whole, but solely within the society of the church members.

The Petitioner argues that tort judgments should be allowed to deter and compensate the type of harm she claims she has suffered: "Tort judgments represent the state interest in providing a substitute for private redress." Petitioner's brief at 9. This statement puts the lesser before the greater. The Constitution, as our nation's organic law, represents the people's fundamental interest in guaranteeing religious freedom. Jehovah's Witnesses have a constitutionally protected freedom to follow the Bible's teaching on who they should view as acceptable and unacceptable associates. They should not be forced, under threat of tort liability, to abandon their Bible-based standards. They should be allowed to follow their understanding of the Bible's teachings on rules and conduct designed to preserve the spiritual health and strength of their congregations. Bizarre, unprecedented tort theories do not override fundamental constitutional rights.

Finally, petitioner repeatedly makes reference to her "constitutional right" to freely leave the organization. She provides no support, legal or otherwise, for her assertion of this "constitutional right." In fact, she freely left the organization, as anyone can. What she disagrees with is the behavior of those she left behind. The Ninth Circuit put this whole case in proper perspective when it said: "The members of the Church Petitioner decided to abandon have concluded that they no longer want to associate with her. We hold that they are free to make that choice." *Paul v. Watchtower Bible and Tract Society of New York,* 819 F.2d 875, 883 (9th Cir. 1987). The district court in essence reached the same conclusion: "[T]he gravamen of [Paul's] action is that people won't talk to her. If there exists a 'right to be talked to,' neither the parties nor the Court are entirely certain of its foundation." Appendix to petitioner's brief at 36. The Constitution no more gives petitioner the "right" to the association of her former Witness acquaintances than it requires them to associate with her.

CONCLUSION

Janice Paul's Petition satisfies none of the criteria for review set forth in Supreme Court Rule 17.

The First Amendment of the United States Constitution and free exercise protections of the Washington Constitution provide an insurmountable barrier to Petitioner's claim for damages.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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